Courts of Appeal as being by a "Judgment" or by a "Decree".

It is clear that the review by the U.S. Supreme Court by petitions for certiorari to said Courts of Appeal in said variety of special statutory proceedings to enforce or review the final actions of administrative agencies (which have not come to the said Courts of Appeal from judicial trial courts) are disposed of by a final judicial determination of said several Courts of Appeal.

In *5 U.S.C.A., Section 1040*, relating to judicial review of those administrative agencies' actions defined in *5 U.S.C.A., Section 1032*, are called "Judgments".

Thus the 90-day period authorized for the filing of a petition for certiorari is from the final judicial adjudication by the Court of Appeals which is properly called a Judgment or Decree and not one improperly so-called in a given special proceeding in such Court of Appeals.

2. **The Decision of This Court in International Ladies' Garment Workers Union, AFL-CIO v. National Labor Relations Board, (decided June 5, 1961, (No. 284, 366 U. S. —) Voiding Good Faith Union Shop Agreement With Minority Union Requires Right of Inspection of Union Membership Cards, Herein Refused.**

In *Ladies' Garment Workers Union AFL-CIO v. National Labor Relations Board*, this Court said:

> * * * "If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate — precisely what Bernhard-Altmann and petitioner failed to do here — he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful by cross-checking, for example, well analyzed employer records with union listings or authorization cards. Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so."

The small manufacturer, petitioning for review herein, who believed he had an outstanding collective bargaining agreement, which the Board found had lapsed, was confronted, between Saturday, September 6th, and Wednesday, September 10th, 1958, with a claim of majority representation by an independent union newly organized on September 2nd, whose very existence the employer disbelieved, had therefor demanded of the Regional Director of the National Labor Relations Board at Chicago, then representing the office of the General Counsel during the preliminary investigation and mediation stage, of unfair labor practice charges, filed between October 13, 1958 and January 29, 1959, that said Regional Director allow the employer to inspect the verified statements of the charging parties claiming to be officers and members

of such independent union, which inspection was refused. Subsequently, before the hearing, the employer sought the production of such documents by subpoenas *duces tecum,* which were quashed at the opening of the hearing. Administrative review of the denial of the motion to inspect or for a dismissal and of the granting of the motion to quash before any witness was put on the stand at the formal hearing of the unfair labor practice complaint, were fully exhausted by the employer. Each denial of the employer's right to inspect or to have the benefit of subpoenas *duces tecum* was based on the secrecy regulation included in the Rules and Regulations of the National Labor Relations Board and not on any lack of showing by the employer of good cause for such inspection or subpoenas *duces tecum.*

These denials of inspection and right of subpoena *duces tecum* because of the so-called secrecy regulations of the appellee are asserted to be *per se* a denial of procedural due process under the relevant statutes and rules.

This Court, in *Bowman Dairy Co. vs. United States* (April 30, 1951) 341 U.S. 214, 220, 221, set forth the right of inspection of evidentiary documents in the possession of a person not a witness. This appears relevant to the proper rule in the instant case.

> "Rule 17 provided for the usual subpoena *ad testificandum* and *duces tecum,* which may be issued by the clerk, with the provision that the court may direct the materials designated in the subpoena *duces tecum* to be produced at a specified time and place for inspection by the defendant. Rule 17 (c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of the subpoenaed materials." *Bowman Dairy Co. v. U.S.* supra, p. 220.

> "In short, any document or other materials, *admissible as evidence,* obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena." *Bowman Dairy Co. v. U.S.*, p. 221.

The rule in *Hickman vs. Taylor*, 327 U. S. 495, referred to in the petition, was to the same effect as that in the *Bowman v. U. S.* decision.

Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385.

> "Rule 34, deals with the discovery and production of documents and things from a *party*, mainly before trial, and therefore covers part of the subject matter dealt with by Rule 45(b)."

> Rules 34 and 45(b) should be "considered in *pari materia* as far as scope of examination is concerned, if a subpoena *duces tecum* is directed to a *party*, particularly at a deposition hearing * * *"

While at the June, 1959 hearing there was a conflict of testimony of the two attorneys for the independent union called as Government witnesses and the Company counsel as to whether a demand was made by the Company counsel at a meeting in his office on September 10, 1958, to examine the charter and by-laws of the newly organized independent union which was later shown at the June, 1959 hearing to have been dated September 2, 1958 and a similar conflict as to a demand for inspection of the membership application cards later testified to then having been in the possession of the two attorneys for the independent union, there is no question but that the testimony of the two independent union attorneys and the union officials discloses that they made no effort to demonstrate or prove the actual existence of such independant union and the majority membership of the shop employees of the employer on September 10, 1958 (or

either before or after that date) in such independent union by presenting the same for inspection.

The record of the written demand by the employer on the Regional Administrator for the inspection of the verified statements of the charging parties which included the president and secretary of the independent union elected on September 2, 1958, and who gave the testimony at the June, 1959 hearing as to such charter, by-laws and membership cards, have been admitted in the briefs, although the original records thereof are not included in the record which was certified by the Appellee to the Court of Appeals, notwithstanding the demand therefor by this appellant.

3. Due Process Was Denied Petitioner by Court of Appeals in Refusing to Order Before it Full Administrative Record Including Proceedings Preliminary to Formal Complaint Hearing Commencing on June 2, 1959.

The record certified on this petition for certiorari includes the application to the Court of Appeals of this petitioner for the certification of the full record by the Appellee without abbreviation.

This application was denied by the Court of Appeals in its Decision of February 28, 1961.

It would have brought before this Court as well as before the Court of Appeals the preliminary Docket and record of petitioner's Motion for Inspection or Dismissal and for Subpoena *duces tecum* and the denial and quashing of said efforts for inspection and discovery and the exhaustion of administrative remedies thereon.

Such supplemental record would have disclosed that said denials of inspection and discovery were based on the secrecy regulations of the Appellee and not on any lack of showing of good cause for such inspection or discovery.

Such supplemental record would have disclosed that petitioner, in a timely manner, in the investigation, mediation and settlement stage as well as before the hearing stage sought procedural due process and did not waive its rights thereto.

That the Court of Appeals should have granted petitioner's request for such supplemental record is shown by the provisions of the 1958 Act of Congress found in 28 U.S.C.A., Sec. 2112 (b) and in the separate rule of the Court of Appeals promulgated by the Judicial Conference on March 26, 1953.

28 U.S.C.A., Sec. 2112 (b) * * * "The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation."

28 U.S.C.A., U.S. Court of Appeals Rules, Rule 14, Seventh Circuit.

"(h) *Omission From or Misstatements in Record.* If anything material to any party is omitted from the record by error or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation or this court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental transcript be certified or a supplemental record prepared and filed."

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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Dated: July 25, 1961.

APPENDIX I-d

COURT OF APPEALS DOCKET IN NATIONAL LABOR RELATIONS BOARD vs. VAPOR BLAST MANUFACTURING COMPANY.

CAUSE No. 13149

9 30 60	Docketed cause.
9 30 60	Filed Orig. & 3c. Petition for Enforcement, Service.
9 30 60	Filed Clerk's copy of notice of Service.
10 4 60	Filed appearance for Petitioner (Dominick Manoli, Marcel Mallet-Prevost)
10 10 60	Filed appearance for Respondent (P. L. Padden)
11 14 60	Filed Original Record.
11 17 60	Filed certificate of service.
11 18 60	Filed appearance for Respondent (H. W. Ihrig, M. Gerwin, E. A. Glick)
11 23 60	Filed 30c. Petitioner's Appendix.
11 25 60	Filed Orig. & 4c. motion to extend time to file Respondent's answer or otherwise plead to Jan. 6, 1961, Aff. & Ser.
12 2 60	Filed Orig. & 4c. NLRB's response to motion to stay proceedings, Ser.
12 5 60	Entered order denying motion filed 11 25 61.
12 8 60	Filed 30c. Petitioner's Brief, Service.
1 7 61	Filed Orig. & 4c. Respondent's motion to extend time to file brief & appendix to 1 24 61, Consent & Aff.
1 9 61	Entered order granting motion filed 1 7 61.
1 23 61	Filed Orig. & 4c. Answer to Petition for Enforcement.
1 23 61	Filed Clerk's copy of notice of service of answer to Petition for Enforcement.

1 24 61	Filed Orig. & 4c. motion to extend time for Respondent's brief & appendix to 1/26/61, Aff. & Ser.
1 24 61	Entered order granting motion filed 1 24 61.
1 26 61	Filed Orig. & 4c. Respondent's motion for certification of preliminary proceedings as a supplement to record or in lieu for a stipulation thereto, Aff. & telegrams in support, Service.
1 26 61	Entered order that motion filed 1/26/61 be continued and taken with oral argument.
1 26 61	Filed 30c. Respondent's brief.
1 26 61	Filed 30c. Respondent's Appendix.
1 31 61	Filed Orig. & 4c. Petitioner's opposition to respondent's for certified supplemental record.
1 31 61	Heard & taken under advisement.
2 28 61	Filed Opinion by Hastings, C. J.
2 28 61	Entered order on Opinion.
3 9 61	Filed proof of service of NLRB's proposed decree.
3 18 61	Filed Orig. & 4c. Respondent's memorandum in opposition to form of proposed decree, Service.
3 18 61	Filed Orig. & 4c. Respondent's motion to stay execution of decree (when entered), Aff. & Ser.
3 20 61	Filed final decree.
3 20 61	Entered final decree.
3 20 61	Issued certified copy final decree to NLRB & counsel.
3 20 61	Entered order staying execution of the final decree for 30 days.
4 18 61	Filed Orig. & 4c. motion to stay execution of the decree an additional 60 days, Service.

4/27/61	Entered order that execution of decree be stayed an additional 60 days.
4 27 61	Issued certified copy of order of 4/27/61 to NLRB & counsel.
6 19 61	Filed notice of docketing in Supreme Court as No. 1042 (60).

The foregoing is a true copy of the docket entries as of July 20, 1961:

Teste:

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX II

SUPPLEMENTAL STATUTES QUOTED

5 U.S.C.A. Sec. 1040

Sec. 1040. Review in Supreme Court on certiorari or certification

An order granting or denying an interlocutory injunction under section 1039 (b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254 (1) of Title 28. *Provided,* That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254 (1) of Title 28: *Provided, further,* That application therefor be duly made within ninety days after the entry of such *judgment.* Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254 (3) of Title 28, regarding certification, and of section 2101 (e) of Title 28, regarding stays, shall also apply to proceedings under this chapter.

(This is a portion of the Act of December 29, 1950 found in Chapter 19 (a) of Title 5 U.S.C.A. which included Sections 1031-1042 but did not apply to final orders of the National Labor Relations Board.)

28 U.S.C.A. Sec. 2101(c)

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C.A. Sec. 2112

(a) The several courts of appeals shall have power to adopt, with the approval of the Judicial Conference of the United States, rules, which so far as practicable shall be uniform in all such courts prescribing the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers, to the extent that the applicable statute does not specifically prescribe such time or manner of filing or contents of the record. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified

and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the said rules of the court of appeals may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules of such court designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency,

board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. *The agency, board, commission, or officer concerned may at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.*

(c) The agency, board, commission, or officer concerned may transmit to the court of appeals the original papers comprising the whole or any part of the record or any supplemental record, otherwise true copies of such papers certified by an authorized officer or deputy of the agency, board, commission or officer concerned shall be transmitted. Any original papers thus transmitted to the court of appeals shall be returned to the agency, board, commission, or officer concerned upon the final determination of the review or enforcement proceeding. Pending such final determination any such papers may be returned by the court temporarily to the custody of the agency, board, commission, or officer concerned if needed

for the transaction of the public business. Certified copies of any papers included in the record or any supplemental record may also be returned to the agency, board, commission, or officer concerned upon the final determination of review or enforcement proceedings.

(d) * * * * *

(Pub. L. 85-791, approved Aug. 28, 1958. For Legislative History see 1958 U. S. Code Cong. & Adm. News, p. 3996.)

(Section 13 of said Act also amended 28 U.S.C.A., Sec. 160 (e) and (f).)

APPENDIX III

SUPPLEMENTAL RULES

Rules of Court of Appeals for the Seventh Circuit
Rule 14 (formerly Rule 28)

Rule 14. Review or Enforcement of Orders of Administrative Agencies, Boards, Commissions and Officers.

(h) Omission From or Misstatements in Record. If anything material to any party is omitted from the record by error or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation or this court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental transcript be certified or a supplemental record prepared and filed.

* * * * *

(1) Preparation of Decrees Enforcing Orders; Settlement; Entry.

When an opinion of this court is filed directing the entry of a decree enforcing in whole or in part the order of an administrative agency, board, commission, or officer and the court has not entered the decree, the agency, board, commission, or officer concerned shall within 10 days serve upon the opposing party and file with the clerk a proposed decree in conformity with the opinion. If the opposing party objects to the proposed decree as not in conformity with the opinion he shall within 5 days thereafter serve upon the agency, board, commission, or officer concerned and file with the clerk a proposed decree which he deems to be in conformity with the opinion. The court will thereupon settle and enter the decree without further hearing or argument.

(This Rule was promulgated by the Court of Appeals for the Seventh Circuit by order dated April 15, 1953, to be effective March 26, 1953. It was made in conformity with March 26, 1953 resolution of the Judicial Conference on the subject matter.)